Sinclair contends that new networks do not need to option time as shown by the introduction of three new networks under the current option time prohibition. Allowing networks to option time can pose serious economic hardships for affiliates and may limit the availability of local programming to viewers.

Sinclair opposes the repeal of the exclusive affiliation rule in any size market as it preserves licensee programming autonomy, resulting in greater diversity for the public. Further, exclusive affiliation agreements hurt new networks by preventing them from gaining entry into smaller markets.

13. Joint Parties

Cosmos Broadcasting Corporation, Cox Broadcasting, Inc., First Media Television, L.P., Guy Gannett Communications, and River City Broadcasting, L.P. (the "Joint Parties"), as licensees of network-affiliated stations, argue that network power vis-a-vis affiliates has increased, not decreased, due to the revolution in the video marketplace. Those recent changes have affected affiliates as well as networks, making network affiliation critical for stations. Furthermore, local competition has increased along with technological advances, adding to the importance of network affiliation.

As Sinclair contended, the Joint Parties note that affiliates often accept restrictive provisions in their contracts because they are afraid of offending their networks. Networks, in turn, often are aggressive and hostile in their dealings with affiliates. The Joint Parties point to several examples where networks have exploited the leverage they have under the existing rules to wrest programming and scheduling control away from affiliates.

a. The Right to Reject Rule

The Joint Parties strenuously object to the proposed modification of the right to reject rule, noting that no statute or case precedent indicates that the licensee's obligation to control its programming does not encompass economic decisions. Instead, a station must retain control over all of its operating decisions. Networks have capitalized on the dependence of their affiliates by formulating draconian affiliation contracts designed to "push the envelope" of the existing rules and manipulate affiliates into becoming virtually open channels for network programming.

The Joint Parties reviewed several provisions in network affiliation contracts that: (1) limit the amount of network programming that affiliates can preempt, (2) require explanations for preemption, (3) require affiliates to clear certain programs upon the expiration of other programming commitments, and (4) obligate affiliates to carry all network programs. Violation of these provisions, by, for example, making an "unauthorized preemption" more than three times in a year, grants the network the right to terminate the affiliation under the terms of the contract. Other contract provisions require prior notice of preemption, with written "justification," and specify allowable levels of preemption. As the

Joint Parties note, the right to reject rule should be strengthened to increase, not decrease, licensee discretion over programming. Network contracts already force affiliates to cede tremendous programming and scheduling control to the networks. The Commission's proposal represents a break with long-standing Commission precedent of guarding station, and thus local, control over programming.

The Joint Parties point to the example of the 1939 World Series cited by the Commission in the Chain Broadcasting Report to support their objection to the proposed limitation of the right to reject rule. The broadcast of the 1939 World Series by an NBC or CBS affiliate would have been an economic preemption. The World Series is an entertainment event, not a public service program.

b. The Time Option Rule

The Joint Parties assert that modifying the time option rule to require a notice provision merely extends the period over which networks can control affiliates. They detail time option-like provisions already present in Fox and NBC affiliate contracts. The Joint Parties note that contrary to the Commission's desire to aid new networks, existing networks would likely exploit the opportunity to option time, thereby denying new networks the ability to find time available to broadcast their programs.

c. Other Network-Affiliate Rules

The Joint Parties advocate the retention of both the exclusive affiliation and dual network rules, arguing that their elimination simply enhances the already excessive bargaining power of the networks and hinders the entry of new networks into the broadcast marketplace. Finally, the Joint Parties acknowledge that the territorial exclusivity rule may be modified, with a 35-mile zone as a reasonable geographic area for network territorial exclusivity.

14. Great Trails Broadcasting Corp. ("Great Trails")

Great Trails Broadcasting Corp. owns WHAG-TV, an NBC affiliate, in Hagerstown, Maryland. Great Trails does not take a position with respect to any network affiliate rule other than the network territorial exclusivity rule. Great Trails argues strenuously for retention of the network territorial exclusivity rule in its present form, but contends that if the Commission concludes that some change is absolutely necessary, then the rule should be amended to expand the exclusivity zone only up to 35 miles. Great Trails argues that any other approach, such as expansion of the exclusivity zone to a station's DMA, would be inequitable, unworkable, and would result in a significant decrease in local news and public affairs programming.

a. The Network Territorial Exclusivity Rule

Great Trails discusses its WHAG-TV station as a prime example of why the network territorial exclusivity rule must be retained without modification. Currently, WHAG-TV broadcasts over two and one-half hours of local news each day as well as local public interest programs. Great Trails asserts that without network affiliation, WHAG-TV would find mere existence to be problematic.

Great Trails argues that networks control the exclusivity zones of their affiliates through their affiliation practices and, therefore, no change is needed to the network territorial exclusivity rule. Great Trails notes that networks generally do not grant affiliations to stations in adjacent cities. In its own case, WHAG-TV is an outlying station in the Washington, D.C. metropolitan area. NBC's Washington, D.C. affiliate fails to cover much of the area served by WHAG-TV with its over-the-air signal, but reaches that zone through cable carriage. Great Trails fears that with a repeal of the network territorial exclusivity rule, or even a modification expanding the exclusivity zones for networks to their DMA, would result in the demise of WHAG-TV.

Great Trails points to recent affiliation realignments as evidence that without the network territorial exclusivity rule, affiliates in major markets would place significant pressure on their networks to retract the affiliation of less important outlying stations. In such a case, the public interest would be harmed because stations in major markets do not address the local concerns of outlying areas.

Great Trails argues that if the Commission determines that it must modify the network territorial exclusivity rule, the 35 mile zone remains the best compromise. Great Trails notes that there would be a benefit to adapting consistent exclusivity zones for both network and syndicated programming. Great Trails contends that a grade B contour-based mileage standard is inadvisable because UHF stations would be put at a significant disadvantage. VHF stations would, based solely on their band of operation, have greater exclusivity zones than UHF stations. Additionally, Great Trails notes that a Grade B contour-based mileage zone would be extremely difficult to implement as each station's Grade B contour is different. Great Trails indicates that such a proposal would require that the Commission become an arbiter of network-affiliate mileage disputes.

Great Trails argues emphatically that a DMA-based mileage zone would destroy WHAG-TV and would likely lead to a similar fate for other smaller market stations. It notes that such a proposal has been rejected by the Commission in the past as unworkable and inequitable. Once again, Great Trails points to the likelihood that major market stations would threaten to go to another network unless its existing network rescinded other affiliations in the DMA. When those stations lose their network affiliations, they will have lost much of their funding that supports local news and other programming. Such an outcome contravenes the public interest because viewers would likely lose most, if not all, access to truly local news.

15. Holston Valley Broadcasting Corporation ("Holston")

Holston is the licensee of a UHF television station and UHF low-power station in the community of Kingsport, Tennessee, and the tri-city area consisting of Bristol, Kingsport, and Johnson City. Holston's television station is affiliated with the ABC Television Network and its low-power station is affiliated with UPN. Holston objects to the Commission's proposed elimination or modification of virtually all of the network affiliate rules.

a. The Right to Reject Rule

In Holston's view, "nothing is more fundamental than the individual licensee's ability to reject any program from any source." Comments of Holston at 1. Holston emphasizes the importance of network affiliation to stations. Holston argues that in practice, a local affiliate will not precipitously reject network programming in the interest of maintaining a positive relationship with its network. If a station continually rejects network programming, the network will have an incentive to affiliate with another station in an adjacent market or to associate with cable or satellite entities to reach the market at issue.

In its discussion of the right to reject rule, Holston cited its preemption of ABC's controversial series, NYPD Blue, during its first season as an example of the value of the rule. Holston preempted NYPD Blue because of its explicit sexual content. Holston notes that approximately 40 stations across the country rejected this program. Eventually ABC limited the sexually explicit scenes, so that virtually all ABC affiliates carried the series in its second year. Holston contends, therefore, that the ability to reject network programming sends an important message to the networks.

Holston considers the Commission's proposal to limit the right to reject network programming based on financial considerations to be ill-founded. Holston argues that such a proposal will lead to an administrative quagmire in which determinations as to why a given program was rejected will be difficult to make. Moreover, Holston notes that occasionally a station's decision to preempt a low-rated network program in favor of a higher rated program may serve the public interest by increasing station revenue to provide for additional local news personnel or for equipment that is required to better present local news.

b. The Time Option Rule

Holston opposes the Commission's proposal to modify the time option rule. Holston argues that allowing networks to option time would severely limit the development of new local programs. Additionally, independent program producers and syndicators would have less opportunity to market new programming, therefore reducing its availability.

c. The Exclusive Affiliation Rule

Holston opposes modification of the exclusive affiliation rule because, in its view, exclusive affiliations are contrary to the public interest. Exclusive affiliations deny local audiences the opportunity to view programs even when a local non-affiliated station may desire to broadcast a program. Holston also notes that there is an interrelationship between the exclusive affiliation rule and the right to reject rule.

d. The Dual Network Rule

Holston suggests that the dual network rule be left in place for the immediate future, but recognizes that the Commission should revisit its relevance once advanced digital television comes into great use. Holston contends that should the Commission repeal the dual network rule, an established network should not be allowed to acquire another established network.

e. The Network Territorial Exclusivity Rule

Finally, Holston urges the Commission to be careful in its evaluation of the network territorial exclusivity rule not to undermine existing agreements. Holston cautions the Commission to prevent large market affiliates from "shutting-out" the affiliation of small market stations -- thereby threatening the existence of the smaller station and its valuable local public service.

16. Thomas C. Smith

Thomas C. Smith has worked in the broadcast industry for over 26 years as a technician for a variety of stations. His comments primarily relate to the dual network rule, but he also addresses the exclusive affiliation and network territorial exclusivity rules.

a. The Dual Network Rule

Mr. Smith indicates that the time to revise the dual network rule may have come. He notes that allowing established networks to create new networks would increase the program alternatives for viewers. Therefore, Mr. Smith supports elimination of the dual network rule.

b. The Exclusive Affiliation Rule

Mr. Smith is concerned that modification of the exclusive affiliation rule will foreclose secondary affiliation agreements. With the elimination of secondary affiliations, he notes, it will be more difficult for new networks to develop and ad hoc regional sports networks may cease to exist. In Mr. Smith's opinion, more stations would need to be created in order to allow exclusive affiliation agreements without hindering the creation of new networks. Mr. Smith thinks that the Commission should consider license allocation matters in conjunction with the deregulation issues.

c. The Network Territorial Exclusivity Rule

With regard to the network territorial exclusivity rule, Mr. Smith suggests that territorial exclusivity agreements be limited to preventing a station from placing its Grade A signal into the community of license of another station affiliated with the same network.

d. Concern About Monopolies

Ultimately, Mr. Smith is concerned that program diversity will be limited by the monopolization of affiliate groups by a small group of large corporations. Mr. Smith contends that although some existing network-affiliate rules have limited growth and competition, deregulation should not be undertaken without a plan for continued growth. In Mr. Smith's words, "the desired outcome of deregulation should be [to] increase competition, not the creation of monopolies." Comment of Thomas C. Smith at 4.

17. Blade Communications, Inc. ("Blade")

Blade is the parent of four network-affiliated television stations in Nampa, Idaho (Fox); Louisville, Kentucky (Fox); Lafayette, Indiana (CBS); and Lima, Ohio (NBC). Blade opposes the proposed modification of the right to reject rule, time option rule, exclusive affiliation rule, and dual network rule, arguing that the ultimate victims of the Commission's proposed rule change will be the public. Blade supports some modification of the network territorial exclusivity rule.

Blade's comment follows very closely those submitted by the Joint Parties, reemphasizing the already tremendous leverage that networks have over their affiliates and the network's willingness to exploit that power to the detriment of the public interest. Blade contends that the network-affiliate relationship has become more adversarial in recent years; networks have been coercing affiliates to accede to contract provisions which are of questionable legality under current regulations.

B. New Networks and Supporters

1. The Warner Brothers Television Network ("WB")

WB is a new network that was launched on January 11, 1995. WB urges the Commission to retain the exclusive affiliation and time option rules as these rules remain "critical to an emerging network" and they prevent the "erection of barriers to the entry of new networks." WB supports Commission efforts to modify both the right to reject rule and the network territorial exclusivity rule.

a. The Exclusive Affiliation Rule

WB strenuously opposes the Notice's proposal to eliminate the exclusive affiliation rule. The "most frustrating task" for WB in building its new network has been finding stations with which it can affiliate. The exclusive affiliation rule allows for secondary affiliations thereby increasing the number of available outlets for network programming. Although secondary affiliation is the last resort for WB, it is still necessary for the survival of a fragile new network. WB characterizes secondary affiliation as "an essential building block" of their its new network. See Comment of WB at 7. This option is especially important given the scarcity of unaffiliated stations. Although disfavored, secondary affiliation has enabled WB to gain entry into some markets.[3]

WB notes that even where stations are available for affiliation, those stations tend to be the weakest in the market. The exclusive affiliation rule affords the new networks the same chance to survive amidst great competition from established networks that was given to the most recent beneficiaries of the rules -- Fox and ABC.

Even though WB can foresee some personal benefit in the elimination of the exclusive affiliation rule, it recognizes that those self-interested concerns are outweighed by the adverse effects on competition and diversity of programming for viewers.

In their comment, WB discusses examples involving UPN and Fox to show how networks that have secured an affiliate first in a given market, have used strong-arm tactics to achieve exclusivity with their affiliates at the expense of a new competitor.

b. The Time Option Rule

WB notes that the time option rule increases available outlets for network programming. WB cautions that eliminating the time option rule could hinder or eliminate a station's ability to enter into secondary affiliations, thereby harming a new network that does not have a primary affiliate. The rule is particularly harsh in its application, because it prevents the last network trying to gain entry into the marketplace from doing so. Time optioning, even with a notice period of any length, effectively prevents secondary affiliation -- to the detriment of emerging networks.

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[3] WB is less than one year old. Although WB has been able to secure significant coverage, the network had difficulty in finding enough affiliates and powerful stations with nationwide reach. WB experienced difficulty in finding affiliates in both large and small markets. As a consequence, WB has affiliated with a low power station in a major market, and has thirteen (13) secondary affiliates, although they are a disfavored method of affiliation. Even so, WB still covers only 64% of the nation without WGN's cable reach.

c. The Right to Reject Rule

As WB notes, when regularly scheduled network programming is preempted, networks lose substantial advertising revenue which is especially important to a new network that is struggling to recoup its startup costs.[4] Unlike an established network, new networks cannot afford a slump in their ratings or advertising rates.

WB argues that without the modification of the right to reject rule, uncertainty will prevail over whether its programming will be aired. WB, like any other new program producer, requires assurance that its programming will be broadcast before investing the money necessary to make it a viable competitor to the other networks.

2. The United Paramount Network ("UPN")

UPN was "launched" as a new network on January 16, 1995. UPN addresses only the exclusive affiliation and time option rules and it supports the retention of both rules. UPN contends that in the absence of those rules, the development of a fourth, fifth, or sixth network would not have been possible. According to UPN, the exclusive affiliation and time option rules preserve fair play between established and new networks. UPN views both rules to be conditions precedent to its existence.

a. Changes in the Video Marketplace

UPN notes that although networks have recently seen increased competition from other video delivery services, broadcast television remains the only universal, free source of local news and public affairs. Although cable is now widely available, more than a third of eligible homes do not subscribe -- either because they cannot afford it or because they choose not to subscribe. About 35 million households, or 37.5% of Americans, receive all of their video services via free television broadcasting. UPN notes that historically, the Commission has demonstrated an unwavering commitment to universal free access to video services.

b. The Exclusive Affiliation Rule

UPN candidly states that it remains viable only through its reliance on secondary affiliations in many markets. National advertisers require that an emerging network be able to provide coverage of 80% of television households in the United States before marketing their products on that network. UPN's coverage is only 72% of homes without secondary affiliations. UPN's secondary affiliations in 71 markets grant the network an additional 19% coverage for a total of 91% national coverage. UPN has been unable to secure the remaining 9% coverage consisting of secondary affiliates in 60 markets.

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[4] The launch of the WB Network required an initial investment of $300 million and first year losses may be in the $50-$75 million range.

Only 21% of all local markets have the six stations necessary to support the two new networks, amounting to only 59% household coverage.[5] Therefore, secondary affiliation is critical to UPN's existence. UPN acknowledges that secondary affiliation is less desirable than primary affiliation, but that it serves a valuable transitional purpose, without which new networks could not make a viable entry into the marketplace.

UPN notes that once new networks gain entry into the market through secondary affiliations, they encourage the development of new stations, with which they can later develop primary affiliations, providing even greater programming diversity for the local community. Thus, aside from giving new networks the ability to get on the air, secondary affiliations enable new networks to become established networks. UPN candidly admits that it would be forced from the air without the exclusive affiliation rule. UPN opposes any partial repeal of the exclusive affiliation rule, noting that the number of potential adequate affiliates, not the size of a market, is the crucial factor in assessing the value of secondary affiliation.

c. The Time Option Rule

UPN advocates that the time option rule be modified to allow limited time-optioning by emerging networks, but urges the continuation of the ban on the entry-deterring practices of the established networks. UPN proposes allowing new networks to option station time only until they become economically viable networks.

3. Viacom, Inc. ("Viacom")

Viacom, through its subsidiaries, is one of the program suppliers to UPN and has a contingent ownership interest in UPN with an option to purchase 50% of the new network's equity. Paramount Pictures, a subsidiary of Viacom, was instrumental in the development of UPN.

Viacom supports retention of the exclusive affiliation rule and the dual network rule in their present form, retention of the time option rule at least for the established networks, and retention of the right to reject rule with the modification suggested by the Commission. It takes no position with respect to the network territorial exclusivity rule. Viacom is primarily concerned with the encouragement of new networks.

Viacom asserts that the Commission should not further increase the already significant leverage that recent regulatory and market changes have given established networks over their affiliates by its proposed modification of several network-affiliate rules.

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[5] In WB's comment, it noted that almost two thirds of all television markets have only four commercial television stations. In the relatively few markets that have six or more commercial stations, aside from affiliations with ABC, CBS, NBC, and Fox, stations often have affiliations with religious or home shopping networks, making them unavailable to new networks. See Comment of WB, MM Docket 95-92, at 5.

a. Changes in the Video Marketplace

Viacom notes that the Commission has had a long-standing policy of fostering competition among networks by encouraging the development and growth of new networks. Stating that these proposed modifications of the network-affiliate rules "could not have come at a worse time" for the new networks, Viacom outlines how recent economic and regulatory changes already have hindered the ability of emerging networks to compete for audiences and affiliates.

Recently, established networks have begun: (1) acquiring equity interest in their affiliates, solidifying their influence over their affiliates and increasing programming clearances for the long-term; (2) binding their affiliates to long-term affiliation agreements; and (3) buying affiliate loyalty with preferential distribution of independent and recently increased in-house produced programming. Through these recent economic changes, established networks have exerted increasing managerial control over the decisions of their affiliates.

Aside from those market changes, various regulatory changes have boosted network bargaining power against their affiliates. For example, the repeal of the remaining syndication rules will extend network programming leverage over affiliates to syndicated programming. In addition, with the repeal of the Prime Time Access Rule, established networks can expand network hours on their affiliates to encompass all of the prime time hours, putting independent stations at a great disadvantage.

b. The Value of Secondary Affiliation

Viacom contends that elimination of the exclusive affiliation and time option rules for established networks would greatly reduce the number of stations with which emerging networks could affiliate. Additionally, repeal of the dual network rule also would hurt new networks, because established networks would affiliate their new second networks with the remaining independent stations, increasing the difficulty that new networks face when seeking affiliates. Viacom reiterates the importance of secondary affiliation to an emerging network: of UPN's 89% national coverage, about 19% is obtained through secondary affiliates representing 66 stations. Secondary affiliation is essential for new networks to gain entry into these smaller markets.

c. The Time Option Rule

Viacom opposes the lifting of the time option prohibition on established networks, noting that those networks may use option time to limit a new network's access to viewers. Viacom suggests, however, that the time option rule be lifted as to emerging networks, with a six-month notice period imposed.

d. The Dual Network Rule

Viacom urges the Commission to retain the dual network rule to prevent established networks from affiliating with a great number of stations that otherwise would be available for affiliation with new networks. Viacom suggests that since networks can and already have developed a second distribution system through the creation of cable programming networks, they do not need dual networking to realize additional economies of scale. Viacom proposes that the Commission defer any decision regarding the dual network rule until after broadcasters convert to digital operation.

e. The Right to Reject Rule

In support of the Commission's proposal, Viacom notes that the right to reject rule is written with the public interest in mind, not station profitability.

C. The Established Networks

1. Capital Cities/ABC, Inc. ("ABC")

Capital Cities/ABC owns ten television stations and the ABC Television Network, which is affiliated with 200 stations nationwide. ABC supports the Commission's proposals to modify, and in some cases repeal, the network-affiliate rules. ABC contends that the rules impose costs on the networking system that are unnecessary and that outweigh any benefit that the rules may once have conferred on the network-affiliate relationship.

a. Changes in the Video Marketplace

ABC asserts that the networks do not have market power over their affiliates, but rather the affiliates have gained increasing power in recent years as evidenced by the increase in compensation to affiliate stations and the great number of affiliation realignments in the past year. ABC also notes that there has been a vast increase in the number of independent stations and in the availability of non-broadcast outlets which can adequately support the launching of new networks. Consequently, ABC does not believe that the network-affiliate rules are necessary to allow affiliates to fulfill their duty to program in the public interest, nor are they necessary to sustain new networks.

ABC begins its comment discussing the relevance of the recent increase in the number of outlets for video programming, asserting that such outlets have greatly boosted the bargaining power of affiliate stations. ABC notes that the growth of cable, DBS, and other non-broadcast vehicles for delivering video programming have increasingly taken the viewing market share away from the networks. ABC contends that affiliate stations have gained bargaining power with the networks as illustrated by recent affiliation shifts or intentions to shift involving 90 television stations nationwide, sparked by the desire of the Fox network to upgrade its affiliates. ABC claims that the heightened competition for affiliate stations increased network compensation to affiliates by more than $200 million. ABC also identifies the growing trend of group ownership of affiliate stations as evidence of increased affiliate bargaining power.

b. The Right to Reject Rule

ABC supports the Commission's proposal to clarify the right to reject rule to eliminate financial concerns from the decision of an affiliate to reject network programming. ABC contends that this clarification of the right to reject rule is adequate to support the licensee's public interest obligations and could stand alone upon the repeal of the other network-affiliate rules. Therefore, ABC asserts that a modified right to reject rule, in combination with current antitrust enforcement standards, are all that are necessary to protect affiliate programming discretion and to promote opportunities for new networks. All other network-affiliate rules, in the opinion of ABC, are anticompetitive.

ABC denies that it has ever been the intent or practice of a network to constrain an affiliate's ability to discharge its public interest obligations in programming. ABC contends that affiliates clear network programming to serve their own interests. If affiliates do not clear network programming, it becomes difficult for networks to survive financially and, consequently, nonclearance has a negative effect on the success of affiliate stations. ABC asserts that the absence of network power over affiliate stations is demonstrated by the fact that the established networks only program approximately two-thirds of a station's broadcast day. ABC adds that there is no basis for assuming that licensees fail in their responsibility to the public by clearing network programming. Additionally, ABC concludes that the decline in ratings of the established networks is an indicator that they do not have the market power sufficient to foreclose the development of new networks.

c. Long-Term Affiliation Contracts

ABC contends that there is no reason for the Commission to reconsider its 1989 decision to allow long-term network affiliation contracts. In its view, the ability to enter into a long-term affiliation contract leads to significant public benefits and does not foreclose the development of emerging networks. ABC adds that elimination of the network-affiliate rules will not hinder programming diversity.

ABC supports the Commission's proposal to modify the right to reject rule to eliminate the possibility of financially based preemption decisions. It is concerned that affiliates are subject to the temptation of taking "a free ride" on the benefits of a network-affiliate relationship by selectively preempting network programming solely for their own economic needs. Those preemptions hurt network advertising revenue which can reduce the ability of networks to produce high-quality programming.

d. The Time Option Rule

ABC proposes that the time-option rule be repealed or substantially cut back in order to promote economic efficiency in the planning and development of network programming. It asserts that time optioning reduces the risks of program development for networks. ABC denies that the practice of optioning time would be detrimental to the growth of new networks, asserting that non-established network program suppliers can find outlets for their programming through non-broadcast outlets and the increased number of stations. ABC urges the Commission to revise the time-option rule to allow networks to option affiliate time, subject to a minimum notice period.

e. The Exclusive Affiliation Rule

ABC supports the repeal of the exclusive affiliation rule. It contends that the costs of this rule outweigh its purported benefits because the rule inhibits competition. Additionally, ABC asserts that the rule precludes what might be a desirable relationship from the standpoint of both networks and affiliates to allow them to differentiate themselves in an increasingly crowded marketplace. ABC notes that repeal of the exclusive-affiliation rule will aid efficiency by eliminating the "free riding" problem which occurs when stations that are affiliated with established networks build an audience for a new network's competing programs.

ABC argues that a prohibition on exclusive affiliations is unnecessary to protect opportunities for new networks. It asserts that there are sufficient unaffiliated stations in most major markets, in addition to the availability of cable and low-power television stations to supplement the broadcast coverage of the emerging networks. Additionally, ABC points out that channel allotments that are now unused will become activated as new sources of programming develop. Furthermore, ABC asserts that stations in smaller markets have increased leverage to resist exclusivity demands by their networks. ABC also contends that any problems concerning negative effects of exclusivity arrangements on new network development can be resolved through the remedies allowable under antitrust laws.

f. The Dual Network Rule

ABC asserts that the dual network rule is anticompetitive because it prevents innovation. Consequently, ABC supports the total repeal of this rule. ABC contends that there is no basis for concern that the dual network rule will spawn increased network market power. It notes that the dual-network rule is inequitable because it forecloses free over-the-air broadcast services, but does not regulate similar program services in the cable arena. Allowing networks to operate a second network in a given area would not, in the view of ABC, impair competition, but instead would increase alternatives available to advertisers, program producers, local stations, and viewers.

g. **The Network Territorial Exclusivity Rule**

ABC supports the repeal of the network territorial exclusivity rule or, at least, modification of the rule to extend the geographic exclusivity area to the DMA.

2. **CBS, Inc. ("CBS")**

CBS strongly supports the Commission's reevaluation of the network-affiliate rules and takes the position that the rules under consideration may all be eliminated or substantially modified without impeding the development of new networks or preventing licensees from fulfilling their public interest obligations. CBS contends that deregulation in this area will increase competition in the television industry.

a. Changes in the Video Marketplace

In its comment, CBS discusses the changes that have taken place in the video marketplace in the past fifty years. It notes that the number of television stations that are not affiliated with the three established networks has dramatically increased along with the growth of cable and other multichannel program distributors. CBS believes that it is doubtful that networks ever had the power to overwhelm their affiliates' programming decisions by pressuring stations to clear for network programs. CBS contends that the three established networks are coming under increasing competitive pressures as evidenced by their decline in audience shares and national advertising revenue shares.

CBS argues that, for the most part, the network-affiliate rules are no longer relevant because those regulations were predicated upon a theory of "network dominance" which is no longer viable. CBS notes that the total programming offered by the major established networks has, in fact, declined by 25 hours per week from 1977 until 1994.

CBS also points to the emergence of the Fox network as an indication of the fierce competition among networks for affiliates in many markets and the corresponding increase in bargaining power that affiliates have recently gained. This growth in competition for affiliates has resulted in numerous network-affiliate realignments and significant increases in network compensation to affiliates. Furthermore, CBS notes that television stations have increased access to programming through independent syndicators and the new UPN and WB networks. For all these reasons, CBS contends that networks must have freedom to contract to ensure distribution of their programming in order to prosper in this new competitive environment.

b. The Right to Reject Rule

CBS supports the Commission's proposal to modify the right to reject rule to prevent preemptions for solely economic reasons, but opposes allowing stations to preempt network programming to air local sporting events or entertainment programs. CBS argues that if a station has made the economic decision to affiliate with a national network, and has enjoyed the benefits of such affiliation, it should not be granted the right by the government to act in its own economic interest.

CBS contends that affiliate preemptions of network programming reduce the size of audience exposure to advertising and diminish the value of simultaneous network exposure which is critical to advertising campaigns. Consequently, preemptions undermine the ability of networks to engage in expensive programming activity. CBS asserts that most decisions by affiliates to preempt network programming are economically motivated. It argues that networks must have the same ability that their competitors possess to negotiate for reduced preemptions of network programming without being subject to government regulation.

CBS notes that networks present the most cost-effective way of exposing programs to audiences. Thus, CBS argues, no public interest would be served by permitting economically based preemptions of their programming. Although CBS contends that it has no desire to restrict the ability of its affiliates to preempt network programming for public interest programming, it adamantly argues that affiliates should be precluded from preempting network programs in order to broadcast sporting events or syndicated programs.

Concluding that the primary, if not exclusive, motivation for preemptions to broadcast sports and syndicated programming is economically based, CBS argues that such preemptions should be prohibited by the right to reject rule. CBS believes that the effectiveness of the Commission's proposal to modify the right to reject rule would be reduced if affiliates were allowed to preempt network programming in order to broadcast sporting events which have accounted for 41% of all prime time preemptions of CBS programs. CBS notes that it is "virtually certain" that local sporting events that viewers wish to see would be available to them via cable carriage.

In addition, CBS notes that its proposal will merely allow networks to contract to prevent affiliate preemptions to broadcast local sport or entertainment programs, but will not guarantee that networks would be able to secure those guarantees against such preemptions. Ultimately, CBS believes that the right to reject network programs for economic reasons diminishes the value of networking, interferes in the economic relationships between networks and affiliates, and is not essential to a station's ability to satisfy its public interest obligations.

c. The Time Option Rule

CBS supports the total repeal of the time option rule. CBS believes that any determination of a notice period for time optioning should be left to marketplace negotiations between parties and should not be regulated by the government. CBS contends that whether networks are successful in securing option time in the future, even with the repeal of the time option rule, is debatable.

CBS asserts that there is little reason to suspect that networks would try to impose oppressive contractual provisions on their affiliates. CBS further contends that there is little evidence to support an assumption that networks will have undue bargaining power over their affiliates in negotiating time option provisions.

d. The Exclusive Affiliation Rule

CBS urges the Commission to repeal the exclusive affiliation rule as to all markets -- big and small. CBS argues that cable penetration in small markets, as well as other programming outlets, provides ample opportunity for networks to air their programming. Additionally, CBS contends that stations in small markets have increased bargaining power by which they can negotiate whether they will become exclusive affiliates of a particular network.

CBS is concerned that by prohibiting exclusive affiliation agreements, the Commission allows a station to use one network's programming and promotion to build an audience for a competing network's programs. CBS argues that there are ample outlets for the programming of new networks through independent stations and cable entities. CBS questions why any network would opt for secondary affiliations when it can expand coverage through cable carriage.

e. The Dual Network Rule

CBS supports repeal of the dual network rule, contending that the rule is unnecessary to protect the development of new networks, decreases the competitiveness of networks vis-a-vis non-broadcast multiple channel providers, and hinders advances of the digital compression system.

f. The Network Territorial Exclusivity Rule

CBS also supports the Commission's proposal concerning the network territorial exclusivity rule, however, CBS suggests that the Commission completely eliminate the first prong of the rule, which prevents geographic exclusivity agreements between a network and its affiliate.

Finally, CBS asserts that the cumulative effects of its proposals will increase efficiency in network-affiliate relations without impeding the development of new networks or impinging on station autonomy.

3. National Broadcasting Company, Inc. ("NBC")

NBC advocates the repeal of each of the network-affiliate rules. NBC notes that similar rules that once regulated radio were repealed without any detrimental effect. NBC contends that the video marketplace has changed such that the industry is not dominated by a few networks, but rather networks and affiliates now stand as equal partners. NBC further notes that there has been a shift in network-affiliate bargaining power as evidenced by the recent affiliation realignments. NBC urges that the Commission repeal the network-affiliate rules because, in its view, the rules are both unnecessary and inappropriate. NBC contends that the rules hamper its ability to contract with its stations and unnecessarily micro-manage the network-affiliate relationship.

NBC recognizes that an affiliate has a responsibility to program in the public interest, but contends that those obligations can be incorporated into the network-affiliate relationship without the network-affiliate rules. NBC argues that the decision of a station to affiliate with the network is, in itself, an exercise of licensee responsibility. NBC asserts that the rules are largely counter-productive in today's competitive environment.

a. Changes in the Video Marketplace

In its comment, NBC discusses the network-affiliate realignment that occurred in May, 1994, when at least 68 stations changed affiliations and network compensation to their affiliates increased by 50%. The affiliate "bidding wars" resulted largely from the deal between the Fox Network and New World. As a result of that deal, NBC entered into new negotiations with its affiliates reaching, in most cases, seven to ten year agreements with its stations covering close to 80% of the United States television market. NBC indicates that it has, for the first time, committed to providing programming for their affiliates in specific time slots. This commitment involves an enormous investment in entertainment, news and sports programming. In return for that commitment, NBC has more clearly spelled out their affiliates' clearance obligations. NBC contends that this negotiation process is indicative of the relatively equal bargaining strength of networks and affiliates.

NBC notes that the video marketplace has evolved radically since the chain broadcasting rules were promulgated. NBC notes that there are now six commercial national television broadcast networks, including ABC, CBS, NBC, Fox, UPN, and WB. Fox reaches 97% of U.S. television homes with over 150 affiliates and 40 secondary affiliates; UPN reaches 83% of U.S. television homes with 96 affiliates and various secondary affiliates; and WB reaches 78% of U.S. television homes with 47 affiliates, the superstation WGN-TV, and secondary affiliates.

NBC notes that the top 50 markets in America have, on average, five to six stations that are not affiliated with the three original networks. NBC further notes that the influx of alternative sources of programming and distribution outlets has created a steady erosion of the viewing shares attributed to the three established networks. NBC contends that local stations now have an abundance of alternative programming available to them.

b. The Absence of Network Dominance

NBC strenuously opposes any assertion that networks have the ability to dominate their affiliates. It notes that network programming is a cost-effective way to attract viewers. NBC contends that clearance rates among affiliates are high because local stations have made the assessment that network programming is more cost-effective than receiving programming from alternative sources. NBC notes that affiliates regularly reject network daytime programming, indicating that networks do not dominate their decisions. For example, the clearance rates by NBC affiliates of its daytime programming has gone down 10% in the last 20 years. Moreover, NBC asserts that the clearances it has obtained are often not "live" but are broadcast at alternative times.

NBC states emphatically that networks do not have the power to force affiliates to clear programs or control their affiliates' programming choices. Instead, NBC contends that marketplace negotiations are even-handed and that agreements to curtail affiliate independence are the result of marketplace negotiation and are not indicative of network dominance.

c. The Right to Reject Rule

In essence, NBC believes that the right to reject rule should be repealed for three reasons: (1) the principle that licensees retain alternative responsibility over their programming is accepted by all; (2) there is no relevant difference between radio licensees and television licensees, yet radio licensees have been free of this rule since the mid-1970's with no resulting harm to the public interest; and (3) networks are precluded from controlling their affiliate's programming decisions through the competitive marketplace, eliminating the need for a rule that applies only to them.

NBC contends that there is no basis for the right to reject rule from a competition standpoint. NBC asserts that there is no evidence that networks are attempting to impose unsuitable programming material on the audiences of their stations, noting that all of the major networks, themselves, are licensees of broadcast stations. NBC notes that in their relationships with other programs suppliers, affiliates have developed "marketplace solutions" to manage rejections of programming without government interference in the form of the right to reject rule. Therefore, NBC asserts, the right to reject rule places networks at a disadvantage vis-a-vis other programming sources.

Citing four potential sources of programming for local stations -- (1) national networks, (2) national syndicators, (3) local outside producers, and (4) a station's own local production -- NBC argues that the right to reject rule regulates only one supplier of programming. Consequently, the rule cannot be considered necessary for a licensee to retain alternative responsibility for programming decisions.

NBC is concerned that the right to reject rule may be used as a pretext for stations to further their short-term economic interests. In its comment, NBC questions the decision of some of its own affiliates not to clear the program "Leeza," hinting that stations may be preempting the program for economic reasons.

NBC notes that its own affiliation agreements give affiliates the right to preempt NBC programming if a station believes that the network programming would be unsuitable for the local community or to broadcast local news. NBC deems these contract provisions to be "mutually agreeable arrangements." NBC further notes that whether or not the rule is repealed at this time will have no major effect on its current affiliate arrangements.

NBC applauds the Commission's attempt to address the economic versus legitimate rejection distinction under the right to reject rule. However, NBC believes that networks and their affiliates can structure their own commercial arrangements that take into account the affiliate's statutory responsibilities as a licensee in the absence of the right to reject rule.

d. The Time Option Rule

NBC also calls for the repeal of the time option rule, stating that there is no policy justification for a governmental ban on commercial arrangements between networks and affiliates with regard to mutually agreed-upon network time periods. NBC believes that its affiliates feel free to deny network requests to clear several daytime programs. NBC notes that time optioning is a tool that networks could use to arrange, in advance, for affiliate clearances in order to support innovative, high quality programming. In the view of NBC, there is no reason to retain the time option rule in order to assure that non-network programs have station access, because there is an abundance of broadcast and non-broadcast outlets available.

NBC believes that any determination by the Commission of an advanced notice period would be impractical given the fact that its programming decisions are often made on very short notice. NBC contends that the determination of the length of advance notice is an area that should be left to the marketplace. NBC asserts that changes or substitutions on a short time frame have never, in the past, compromised licensee responsibility or the ability of stations to substitute replacement programming or advertising.

e. The Exclusive Affiliation Rule

NBC advocates repeal of the exclusive affiliation rule. NBC notes that most markets today have four or more commercial stations. NBC contends that in smaller markets where the number of networks exceeds the number of stations, the stations hold more bargaining power. NBC characterizes the exclusive affiliation rule as a restriction on station choice, not on network choice, noting that the prevention of exclusive affiliations may deprive stations of economic gains that they could have negotiated in return for network exclusivity.

NBC notes that although NBC affiliates secondarily with seven stations, only two of its affiliates are secondarily affiliated with other networks. Consequently, with the repeal of the exclusive affiliation rule, NBC would lose more than it would gain. NBC emphasizes the benefit of broadcasters' ability to "brand themselves" in a competitive marketplace to differentiate themselves. NBC argues that the marketplace should determine whether stations obtain primary or secondary affiliations.

f. The Dual Network Rule

NBC argues that the dual network rule should be repealed because it discriminates against free, over-the-air broadcasting and contravenes the Commission's goals of enhancing competition and diversity. NBC asserts that two of the established networks have channelled new investment into non-broadcast activities rather than broadcast activities, because pay media is not subject to the dual network rule. NBC asserts that repeal of the dual network rule would contribute to the diversity of programming available to both viewers and stations. In the view of NBC, the repeal of the dual network rule would not prevent the entry of new programming sources, but rather will allow broadcast networks to compete against first-run syndicator and cable programmers.

g. The Network Territorial Exclusivity Rule

NBC supports the repeal of the network territorial exclusivity rule.

III. Conclusion

As revealed in the comments, all sides of the debate on the Commission's proposal to modify the network-affiliate rules argue, quite passionately, on behalf of their positions. NASA, INTV, and other station organizations highlight the growing dominance of the networks and predict dire consequences upon repeal or modification of the rules. New networks note their fragility as emerging competitors of the established networks and urge retention of most of the rules to protect their ability to gain entry into the broadcast market. Established networks, on the other hand, point to growing affiliate power (as evidenced by affiliation realignments, increased compensation, and the growth of group ownership) and the abundance of alternative outlets for new network programming as indicators that the network-affiliate rules are no longer necessary.

Exhibit B

FOX BROADCASTING COMPANY

STATION AFFILIATION AGREEMENT

This sets forth the terms and conditions of the agreement between Fox Broadcasting Company ("Fox"), on behalf of itself and its wholly-owned subsidiary, the Fox Children's Network, and 'Licensee") for the carriage of programming over the facilities of Licensee's television station ("Station"). As used in this Agreement, the terms "program," "programming" and "Fox programming" and any derivations thereof shall mean, unless specifically indicated otherwise, the programming of Fox and the programming of FCN, and all terms of this Agreement shall apply to both.

1. Fox Programming: Fox will deliver to the Station for free over-the-air television broadcasting, all programming which Fox and FCN make available for broadcasting in the community to which Station is presently licensed by the FCC, which is The selection, scheduling, substitution and withdrawal or any program or portion thereof shall at all times remain within the sole discretion and control of Fox. Licensee shall not and shall not authorize others to broadcast or otherwise use any program (or part thereof) or other material supplied by Fox except as specified in this Agreement, and without limiting the foregoing, Station may broadcast Fox programming only: (i) as scheduled by Fox, (ii) over the facilities of Station in the Community specified above in this Paragraph 1 ("Station's Community"), and (iii) by free over-the-air television broadcasting.

2. Delivery: Fox will transmit the programming hereunder by satellite and shall keep Licensee apprised of both the satellite and transponder being used for such transmission. Any and all costs of whatever kind or nature incurred with respect to the pickup of the programming from the satellite and its rebroadcast by the Station shall be borne by and shall be the sole responsibility of Licensee.

3. Carriage & Preemption:

(a) Licensee agrees to broadcast over the facilities of the Station all Fox programs in their entirety, including, but not limited to, all commercial announcements, Fox i.d.'s, promos and credits, without interruption, deletion or addition (except for the addition of Licensee's commercial announcements as provided hereunder) on the dates and at the times the programs are scheduled by Fox.

(b) Fox commits to supply sufficient programming throughout the term of this Agreement for the hours presently programmed by it (the "Programmed Time Periods"), which Programmed Time Periods are as follows (for programming other than FCN programming, the specified times apply for the Eastern or Pacific Time Zones, and the Mountain and Central Time Zones are one hour earlier; for FCN programming, the specified times apply to all Time Zones, except as agreed otherwise by Fox):

Prime Time:	7-11 P.M. Sunday 8-10 P.M. Monday 8-10 P.M. Tuesday & Wednesday (one night commencing July 1992 and one night commencing October 1992) 8-10 P.M. Thursday, Friday & Saturday.
Late Night:	11 P.M.-12:00 A.M. Monday through Friday (commencing September 1993) 11 P.M.-12:00 A.M. Saturday
FCN:	8:00 A.M.-10:00 A.M. Sunday (commencing September 1994) 7:30 A.M.-8:00 A.M. Monday thru Friday (commencing September 1993) 8:00 A.M.-8:30 A.M. Monday thru Friday 3:00 P.M.-5:00 P.M. Monday thru Friday 8:00 A.M.-11:00 A.M. Saturday 11:00 A.M.-12:00 Noon Saturday (commencing September 1992).

Licensee hereby confirms that, except as expressly provided in Exhibit A attached hereto (with respect to non-sports programming) and Exhibit B attached hereto (with respect to sports programming), which Exhibits are incorporated herein by this reference, Licensee has no obligations or commitments as of the date hereof that would interfere or conflict with Licensee broadcasting over Station during the Programmed Time Periods, throughout the term of this Agreement, all Fox programming specified by Fox, and Licensee hereby agrees that, subject only to the preemption rights contained in Paragraph 11 below and to the immediately following sentence: (i) Licensee shall broadcast all Fox programming as specified by Fox in the Programmed Time Periods except to the extent that Licensee is actually broadcasting programming pursuant to (and within the specified limits of) a commitment expressly set forth in Exhibit A or B hereto, but not including any renewals or extensions thereof (including without limitation any extensions by exercise of any option), and (ii) if any Fox programming specified by Fox during the Programmed Time Periods is not broadcast by Licensee pursuant to any such commitment, then such programming not so broadcast shall be broadcast in the "make good" time period specified in Exhibit A or B, as applicable. To the extent that Fox elects during any of the Programmed Time Periods to provide programming originated by the Fox Net Cable Service (i.e., Fox Net programming that is normally exhibited by Fox Net outside of the time periods during which Fox national network programming is exhibited) or similar programming that is not Fox national programming, then notwithstanding anything to the contrary in this Paragraph 3, Licensee shall not be obligated to broadcast said Fox Net or similar programming over Station and may substitute any other programming at the specific times that said Fox Net or similar programming is provided.

(c) Without limitation to the provisions of subparagraph (b) above, in the event that Licensee, for any reason, fails to telecast or advises Fox that it will not telecast any Fox programming as provided herein, then, in each case, Licensee, upon notice from Fox to Licensee, will telecast such omitted programming and the commercial announcements contained therein (or any replacement programming and the commercial announcements contained therein) during a time period(s) which the parties shall promptly and mutually agree upon and which shall be of quality and rating value comparable to that of the time period(s) at which such omitted programming was not telecast as provided herein. In the event that the parties do not promptly agree upon a time period(s) as provided in the preceding sentence, then, without limitation to any other rights of Fox under this Agreement or otherwise, Fox shall have the right to license the broadcast rights to the applicable omitted programming (or replacement programming) to another television station located in Station's Community.

(d) For the purposes of this Agreement, an "Approved Preemption" shall mean: any failure to broadcast due to force majeure as provided for in Paragraph 7 below, any preemption permitted by Exhibit A or B hereto that is "made good" in accordance therewith and any preemption permitted by Paragraph 11 below. Any other preemption or failure to broadcast any Fox programming shall be deemed an "Unauthorized Preemption" and without limiting any other rights of Fox under this Agreement or otherwise, if within any 12-month period during the term of this Agreement, Station makes three (3) or more Unauthorized

Preemptions of any Fox programming (or Licensee or Station states, either in general or specific terms, that Station intends to make such Unauthorized Preemptions or Fox reasonably concludes, based upon Licensee's or Station's actions or otherwise, that such Unauthorized Preemptions will occur), Fox may, upon 30 days prior written notice to Licensee, elect to either: (1) terminate Station's right to broadcast any one or more series or other Fox programs, as Fox shall elect, and, to the extent and for the period(s) that Fox elects, thereafter license the broadcast rights to the applicable series or other Fox programs to any other television station or stations located in Station's Community, or (2) terminate this Agreement.

4. <u>Promotion</u>:

(a) Fox will provide Licensee with on-air promotional announcements, which may be for any Fox programming ("Fox Promos"), including without limitation, any FCN programming, for broadcast in Station's non-Fox programming. Licensee agrees that it will use its good faith, best efforts to provide an on-air promotional schedule consistent with Fox's recommendations and in coordination with Fox, and to budget Station's annual advertising funds in such a manner as to enable Station to participate, on a year-round basis, in Fox's "co-op" advertising plan. Without limitation to the foregoing, in each instance, if any, that Fox determines that Station's "Sweeps Rating" (as defined below) is below the average Sweeps Rating for all Fox affiliated stations, then Station shall be deemed to be "Performing Below Average" and shall, within 15 days of Fox giving Licensee written notice thereof, commence full compliance with the following: (1) in no event shall Station broadcast, during each one-half hour of all periods of each day that Station is not broadcasting Fox programming (the "Non-Fox Time Periods"), less than one (1) thirty (30) second promotional announcement (or promotional announcements aggregating 30 seconds, to the extent Fox so elects) for Station's local, syndicated or Fox programming, and (2) during all Non-Fox Time Periods, Licensee shall broadcast Fox Promos for not less than 45% of 100% (the "Applicable Percentage") of the total, aggregate "gross ratings points" for all the promotional announcements broadcast by Licensee ("Aggregate Promotional GRP's") within the Non-Fox Time Periods (the specific Fox Promos broadcast by Licensee and number of broadcasts of each Fox Promo shall be, to the extent Fox elects, as specified by Fox, and the broadcasts of the Fox Promos shall be made so that the GRP's allocated thereto are distributed fairly and reasonably across the Non-Fox Time Periods);